

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF IDAHO**

<b>IN RE</b>	)	
	)	
<b>PICH, WILLIAM R.,</b>	)	<b>Case No. 99-21386</b>
	)	
	)	
<b>Debtor.</b>	)	<b>SUMMARY DECISION AND</b>
	)	<b>ORDER</b>
_____	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Louis Garbrecht, Couer d'Alene, Idaho, for Debtor.

R. Wayne Sweney, LUKINS & ANNIS, Couer d'Alene, Idaho, for Wells Fargo Bank NA.

Edward W. Kok, LUKINS & ANNIS, Couer d'Alene, Idaho, for Deere and Company.

C. Barry Zimmerman, Couer d'Alene, Idaho, Trustee.

**BACKGROUND**

On November 10, 1999, William Pich ("Pich") filed a voluntary petition for relief under chapter 13 of the Code. Schedules were not filed until a month later, on December 9, and a proposed plan followed on December 15.

On his schedule I, in regard to the status of his post-bankruptcy employment and income, Pich stated:

Debtor seeking employment; strong indication of out-of-town employment. Estimated monthly income to be \$2,000. Expenses shown [on schedule J] are anticipated future.

Pich was, prior to bankruptcy, employed by his closely held corporation, PIC Industries, Inc., an entity no longer in business. Pich's schedule B claimed no value attended his ownership interests in the corporation.

The plan filed on December 15 proposed 36 monthly payments of \$70.00, and sale of certain commercial/industrial real property and improvements which Pich owned in Coeur d'Alene, Idaho. He had, prebankruptcy, leased this property to PIC Industries. While these improvements were designed and constructed for PIC's business use, Pich also resided there.

A hearing was held on January 11, 2000 on several motions. Creditor, Wells Fargo Bank sought relief from stay in order to foreclose a consensual security interest in the real property and the improvements. It objected to Pich's claim of homestead exemption in that property. It also sought to dismiss the chapter 13 case on the basis that Pich was not eligible for relief, because he was unemployed, had no regular income, and sought to confirm a plan which for all practical purposes was funded solely through sale of the real property. At the time of this hearing, some 60 days after filing, Pich was still unemployed.

The Court took these issues, along with the motion of Pich to avoid certain judgment liens under § 522(f), under advisement at the close of evidence and argument on January 11.

Pich had previously provided notice to creditors of a February 15 confirmation hearing on his plan. A number of objections to confirmation were lodged. On January 26, Pich also filed a motion seeking leave to sell the real estate. See § 1303. That motion was also scheduled by Pich for hearing on February 15. Wells Fargo sought discovery concerning that sale, which Pich resisted on the theory that it would dissuade his buyer from going forward with the sale.

The Court heard oral argument on this discovery issue on February 4. At the conclusion of that argument, it entered a ruling granting the motion of Wells Fargo to dismiss the case under § 1307(c) based upon the lack of eligibility of the debtor for chapter 13 relief. See §§ 109(e), 101(30). See also, *In re Lindsay*, 183 B.R. 624, 626-27, 95 I.B.C.R. 142, 144 (Bankr. D. Idaho 1995). Pich, however, was given 10 days within which to convert his case to another chapter before the dismissal order would be entered. The other matters under advisement were rendered moot by the dismissal ruling. An Order consistent with the ruling was also entered February 4.

On February 14, Pich's counsel filed a "Motion to Reconsider" the February 4 Order, stating:

This Motion is based upon the debtor's plans to obtain a truck driving job in Arizona as soon as the commercial building in Coeur d'Alene, Idaho, is sold. It is necessary for the debtor to remain in Coeur d'Alene, Idaho, until the sale is consummated, and upon

completion of the sale, the debtor will have sufficient employment to make the plan payments as proposed herein.

On that same day, Pich personally appeared at the office of the clerk in Coeur d'Alene and filed two "*pro se*" pleadings. The first, a "Motion for Reconsideration" argues that Pich is eligible under § 109(e) and has sufficiently stable income to propose and fund a plan, and alleges that "he has been gainfully employed and has received regular income since January, 2000." Motion at pp. 2 - 3. The second pleading, entitled "Motion for Continuance," seeks continuation of the February 15 hearings previously scheduled on confirmation and on sale of the commercial property. In that document, Pich asserts dissatisfaction with his counsel, and a desire to retain new counsel.<sup>1</sup> He seeks a thirty day continuance of hearing on these two identified matters in the case and, implicitly, the Court's agreement to abate dismissal under the February 4 Order until such later hearing.

## **DISCUSSION**

### **A. Reconsideration**

The Rules do not provide for "motions to reconsider." *In re America West Airlines, Inc.*, 240 B.R. 34, 38 (Bankr. D. Ariz. 1999). Such motions must establish a right to relief under Fed.R.Bankr.P. 9023 or 9024. *Id.* Neither motion here does so.

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<sup>1</sup> Pich's position regarding change of counsel was apparently not communicated to his attorney, who filed a pleading on Pich's behalf the same day Pich was filing his motions. There has been no substitution of counsel, nor any request of Pich's attorney for leave to withdraw as counsel, in accord with Local Bankruptcy Rule 9010.1.

Counsel's motion not only fails to allege a basis for relief from the February 4 Order under these Rules, the argument advanced makes it clear that the Order was well founded. The motion alleges that Pich "plans to obtain" employment; it was the absence of existing employment that laid the basis for the eligibility ruling. This motion will be denied.

Pich's "Motion for Reconsideration" suffers from several problems. First is the fact that he is already represented by counsel, and that attorney has not been granted leave to withdraw. As a general proposition, a party speaks through his counsel until that counsel is relieved of his obligation of representation.<sup>2</sup>

Second, a great deal of the motion simply reargues the eligibility question. A motion for reconsideration is not proper simply to reassert positions already advanced and considered. *America West*, 240 B.R. at 38, citing *Above The Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

Third, like his lawyer's motion, Pich's does not identify any sort of basis for relief from the February 4 Order under the provisions of Rules 59 and 60 of the Federal Rules of Civil Procedure made applicable by Fed.R.Bankr.P. 9023 and 9024. The Court is sensitive to the fact that Pich is not trained as a lawyer, but even generously reading the submission fails to identify a proper basis for relief from the Order.

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<sup>2</sup> The Court is aware, however, that here Pich expresses a desire to terminate the representation by his counsel. While withdrawal and substitution are not before the Court, the situation is such that the Court has considered Pich's "*pro se*" pleadings.

In regard to this question, the Court has reflected on Pich's assertion that he has been "gainfully employed" since January and enjoyed a "regular" income. If true, that would be a material fact in the Court's consideration of the eligibility question and, consequently, the ruling on the motion to dismiss. But several problems attend this assertion.

Pich is not an officer of the Court. The assertion of existing employment is not made by affidavit or otherwise under oath. The assertion is not substantiated by any amended schedule I of the Debtor. There are no details provided as to this employment, or the magnitude or the "regular" nature of the alleged income. The allegation of present employment is inconsistent with Pich's testimony on January 11. These factors impact the weight the Court can give the assertion under all the circumstances.

The idea that Pich has present regular income which justifies retention of the case as a chapter 13 proceeding is not entirely consistent with the idea that Pich needs to go to Arizona in order to obtain regular employment. Both his counsel's motion for reconsideration and Pich's own motion for continuance indicate that Pich is seeking employment in Arizona. In fact, Pich's motion for continuance states: "The Debtor cannot make himself available for a hearing to be held in this matter on February 15, 2000, as he is scheduled to be in Phoenix, Arizona, on that day with a view to securing regular, full-time employment." (*Id.*, at para. 1, emphasis added).

Case law instructs that chapter 13 eligibility issues are to be promptly determined. *Nicholes v. Johnny Appleseed of Washington (In re Nicholes)*, 184

B.R. 82, 87 (9<sup>th</sup> Cir. BAP 1995). Pich and his counsel both appear to argue for a “rolling” window of opportunity within which they can use future events to establish present eligibility. No authority for such an approach to chapter 13 has been provided. The evidentiary record properly before the Court reflects a lack of sufficiently regular income to fund the plan for its term. The fact that a debtor might, in the future, become qualified to file or prosecute a chapter 13 case is of no consequence to the issue of whether he is presently qualified. These arguments provide no basis for relief from the February 4 Order.

Additionally, the allegation that Pich already has “regular” employment was not advanced at the January 11 hearing. If true, it would not appear to be “newly discovered evidence” under the contemplation of the Rules, since that information would necessarily have been available to Pich and his counsel prior to the hearing. *Krommenhoek v. Covino (In re Covino)*, 241 B.R. 673, 680, 99.4 I.B.C.R. 138, 141 (Bankr. D. Idaho 1999).

Both motions for reconsideration will, for the foregoing reasons, be denied.

#### **B. Continuance**

The motion for continuance addresses matters previously scheduled for hearing on February 15. The Court’s ruling on February 4 made it clear that the hearings on February 15 would not go forward. The case would either be dismissed or converted. If converted, any matters not inherently mooted would have to be renoticed. In either event, there would be no hearing on confirmation and no hearing on the Debtor’s proposed sale. There was and is, therefore, nothing to continue.

The motion for continuance will be denied.

## **CONCLUSION**

The motions for reconsideration filed by Pich and his counsel are DENIED.

The motion for continuance is DENIED.

The Order of February 4 established that this case would be dismissed unless converted by the Debtor on or before February 14. Conversion did not occur. The case shall be and hereby is DISMISSED.<sup>3</sup>

Dated this 24th day of February, 2000.

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<sup>3</sup> Stay relief motions and stipulations are moot as a result of the dismissal. See § 362(c).